Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5414

ILYA WOLSTON, *Petitioner*

v.

THE READER'S DIGEST ASSOCIATION, INC., d/b/a READER'S DIGEST PRESS; BANTAM BOOKS, INC.; BOOK-OF-THE-MONTH CLUB, INC., MACMILLAN BOOK CLUBS, INC.; JOHN BARRON, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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The respondents, The Reader's Digest Association, Inc., John Barron, Bantam Books, Inc., The Book-of-the-Month Club, Inc., and MacMillan Book Clubs, Inc., respectfully request that this Court deny the petition for a writ of certiorari seeking review of the opinion of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 578 F.2d 427. The opinion of the district court (Pet. App. 17-30) is reported at 429 F. Supp. 167.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1978. The petition for a writ of certiorari was filed on September 18, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was correctly held to be a public figure under *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976) for the limited purpose of the issues involved in this case.

2. Whether judgment was properly granted in respondents' favor on the issue of whether the allegedly libelous statement was published with "actual malice," that is, "with knowledge that it was false or with reckless disregard of whether it was false or not," as required by *New York Times, Inc.* v. *Sullivan*, 376 U.S. 254, 271-72 (1964) and its progeny.

STATEMENT

This case involves a libel action brought by petitioner Ilya Wolston against the respondent author, John Barron, and the respondent publishers of a book entitled *"KGB: The Secret Work of Soviet Secret Agents"* (hereinafter *KGB*).[1] The pertinent factual background of this case is fully and accurately set forth in the opinion of the court of appeals. Briefly, it is as follows:

During 1957 and 1958, a special federal grand jury convened in the Southern District of New York was conducting an investigation into the activities of Soviet intelligence agents

[1] Respondent The Reader's Digest Association, Inc. is the initial publisher of *KGB*. Respondents Bantam Books, Inc., The Book-of-the-Month Club, Inc., and MacMillan Book Clubs, Inc. are the subsequent publishers under contractual arrangements with The Reader's Digest.

in the United States. On January 25, 1957, the Federal Bureau of Investigation arrested petitioner Wolston's aunt and uncle, Jack and Myra Soble, on espionage charges. The special federal grand jury later indicted the Sobles on five counts charging espionage, conspiracy, and violation of the Registration Acts. In April 1957, Jack Soble pleaded guilty to espionage charges and was sentenced to seven-years imprisonment. (Pet. App. A-5).

On the day of the Sobles' arrest, the FBI interviewed petitioner at his home. Shortly thereafter, the special federal grand jury subpoenaed petitioner to appear in connection with its continuing investigation of Soviet espionage. (Pet. App. A-5). On July 1, 1958, petitioner failed to respond to a subpoena requiring his appearance before the special federal grand jury on that date. The United States District Court for the Southern District of New York thereupon issued a show cause order to petitioner, and on August 7, 1958, following a hearing on the matter, petitioner pleaded guilty to the charge of criminal contempt. Petitioner received a one-year suspended sentence and was placed on probation for three years on the condition that he be available for any further grand jury inquiries regarding Soviet espionage. (Pet. App. A-5, A-6).

As set forth in the record and recounted in the opinions of the district court and court of appeals, petitioner's criminal evasion of the grand jury subpoena and involvement in the contempt proceedings attracted a significant amount of public attention and were the subject of at least fifteen newspaper articles. News articles were published in New York, where the grand jury was sitting, and in Washington, D.C., where petitioner lived. The articles focused on petitioner Wolston's failure to appear and on the United States District Court's show cause order. (Pet. App. A-6, A-7). The articles reported statements by Assistant United States Attorney Herbert C. Kantor that petitioner was the nephew of the Sobles and had been in contact with them for a long time before their arrest in January 1957. Three of the articles reported a statement by Mr.

Kantor that petitioner was believed to have material information about the espionage matters under investigation, which were described as concerning a "general criminal conspiracy against the U.S." (Pet. App. A-6).

Newspapers further reported that the federal judge presiding at the contempt hearing commented that "there is no question in my mind that there was a studied attempt [by Wolston] to avoid [an] appearance before this grand jury." (Pet. App. A-6). Other news articles stated that, according to Assistant United States Attorney Kantor, petitioner had also failed to appear in response to five prior subpoenaes issued by the special federal grand jury. News articles were later published about petitioner's plea to criminal contempt and about petitioner's sentence and probation. (Pet. App. A-6). In sum, as the record reflects, petitioner's activities and criminal conduct in relation to the special federal grand jury's investigation were the subject of extended public comment and attention.

These matters concerning petitioner continued to be the subject of public discussion. In 1959, a book written by Boris Morros entitled *My Ten Years As A Counterspy* was published by Viking Press, Inc. Morros was a confessed Soviet espionage agent who later served as an intelligence agent for the Federal Bureau of Investigation. He was also a former confederate of Jack Soble, petitioner's uncle. In his book, Morros identified petitioner as a Soviet espionage agent in the United States. According to Morros, Soble claimed that an individual who had operated in Germany under the code name "Slava" had supplied him with information valuable to the Soviets. Morros stated that Soble subsequently identified Ilya Wolston as "Slava." Morros added, however, that he knew nothing about Wolston's activities except what Soble, "a confirmed liar," had told him. (Pet. App. A-9). The book also recited that Wolston failed to respond to six subpoenas issued by a federal grand jury, that Wolston pleaded guilty to a contempt-of-court charge, and that he received a one-year suspended sentence.

In 1960, the Federal Bureau of Investigation completed a report entitled "Expose of Soviet Espionage, May 1960." (Pet. App. A-10). By direction of the Attorney General, the FBI report was transmitted to the Internal Security Subcommittee of the Senate Judiciary Committee and was published by that Subcommittee in July of 1960. On page 24, the report stated that an FBI investigation resulted in identifying Ilya Wolston as a Soviet intelligence agent:

> "In addition, the FBI investigation resulted in identifying as Soviet intelligence agents ... Ilya Wolston, who was charged with contempt for failing to appear before a grand jury and on August 7, 1958, pleaded guilty in the Southern District of New York ...." (Pet. App. A-10).

In another section entitled "Ilya Wolston," the FBI report reiterated the information Soble had provided to Morros to the effect that petitioner was the Soviet agent known as "Slava" and further stated that Soble, when pleading guilty to espionage in April 1957, furnished information identifying Wolston as a Soviet agent. In addition, the FBI report stated that the Department of State had also previously received information concerning petitioner Wolston's probable identification as a Soviet agent:

> "Information concerning the probable identification of Wolston as a Soviet agent was furnished to the Department of State in 1951, together with data developed concerning his black market activities in Germany. The Department of State, on the basis of these data, dismissed Wolston from his employment in Berlin." (Pet. App. A-12).

As set forth above, the report indicated that the FBI did not rely exclusively or even primarily on Soble in identifying Wolston as a Soviet agent. On the earlier cited page, the report categorically stated that an FBI investigation resulted in the identification of petitioner as a Soviet agent, and another

section of the report stated that information concerning the probable identification of Wolston as a Soviet agent was furnished to the Department of State in 1951, six years before Soble's arrest for espionage.

In January 1974, Reader's Digest Press published *KGB*, which details the functions and activities of the Soviet Union's intelligence and espionage organization. The author of *KGB*, John Barron, devoted more than four years to researching and writing the book, drawing on the world-wide research facilities of Reader's Digest organization. Another Reader's Digest professional assisted the author in researching *KGB* on a full-time basis during the four-year period in which the book was prepared. On page 188 of the book, referring to disclosures by "royal commissions in Canada and Australia and official investigations in Great Britain and the United States," the following sentence and footnote appear concerning petitioner:

> "*Among Soviet agents identified in the United States were* Elizabeth T. Bentley, Edward Joseph Fitzgerald, William Ludwig Ullmann, William Walter Remington, Franklin Victor Reno, Judith Coplon, Harry Gold, David Greenglass, Julius and Ethel Rosenberg, Morton Sobell, William Perl, Alfred Dean Slack, Jack Soble, *Ilya Wolston,* Alfred and Martha Stern.*

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* No claim is made that this list is complete. It consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments, or who fled to the Soviet bloc to avoid prosecution . . . ." (Pet. App. A-3). (Emphasis added).

In addition, the following entry concerning Wolston appears in the index to KGB:

> "Wolston, Ilya, Soviet agent in U.S., 188". (Pet. App. A-3).

In the more than 460 pages of *KGB*, the sentences quoted above consitute the only references to Wolston.

In March 1975, petitioner filed the present libel action against respondents. Petitioner claimed that *KGB* contained false and libelous statements to the effect that he had been identified as a Soviet agent and that he had been indicted for espionage. On deposition and in an affidavit, respondent Barron testified that, in referring to Wolston in *KGB* as having been identified as a Soviet agent, he relied on the May 1960 FBI report, which unequivocally identified Wolston as a Soviet intelligence agent. (Pet. App. A-12). The FBI report is cited in the "Chapter Notes" of *KGB* as a source document for the information about Soviet agents in the United States appearing in Chapter IX of the book. This is the chapter containing the references to Wolston.

The affidavits and depositions submitted in the district court further established that at no time was Barron ever aware of any fact giving him reason to doubt the truth of the FBI report or any statement in that report. (Pet. App. A-12). There was no evidence that the accuracy of the FBI report had been called into question at the time *KGB* was published; nor was there any evidence that the respondents had, or should have had, any reason to doubt the accuracy of the FBI's identification of Wolston as a Soviet agent. The record also showed that upon publication of *KGB*, Barron believed that the book as a whole and each and every statement in it were true and that he was not aware of any fact that tended to make him doubt the truth of the book and the statements therein. Relying on the reputation of the Reader's Digest as a well-known and respectable publishing house, the subsequent publishers also believed that *KGB* was accurate in all respects and were not aware of any fact that tended to make them doubt the truth of the book; they were not aware of any claims of inaccuracy concerning the book. (CA App. 341-347).

On the basis of the above record, the district court granted respondents' motion for summary judgment. 429 F.Supp. 167

(D.D.C. 1977). 1977). The court of appeals affirmed. 578 F.2d 427 (D.C. Cir. 1978). The court of appeals held that under the standard of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), petitioner was a public figure for the limited purpose of comment on his connection with, or involvement in, espionage in the 1940's and 1950's, which was the subject of the alleged falsehood. (Pet. App. A-7). The court of appeals therefore noted that, in order to recover, petitioner was required to demonstrate that the alleged falsehood was published with "actual malice," that is, with knowledge that it was false or with reckless disregard of whether it was false or not. (Pet. App. A-7). Finding that the district court had correctly held that the evidence raised no genuine issue with regard to the existence of actual malice on respondents' part, and that petitioner could not make the necessary showing in that regard, the court of appeals concluded that summary judgment for respondents was required. (Pet. App. A-8—A-16).

ARGUMENT

As the opinions of both lower courts plainly demonstrate, this case involves the straightforward application of the settled principles of *Gertz* v. *Robert Welch, Inc., supra,* and *Time, Inc.* v. *Firestone, supra,* to the discrete and unique facts presented in the instant record. The court of appeals did not purport to announce any new legal principle, and the issues which petitioner seeks to raise are essentially factual in nature. Accordingly, respondents submit that this case does not possess the continuing importance required to warrant this Court's review. Therefore, the petition should be denied.

A. The Decision Below That Petitioner Is A Public Figure Is In Accord With This Court's Prior Decisions And Raises No Substantial Question

1. With respect to the first question raised in his application (Pet. 10-14), petitioner's contention that, under the

facts of this case, he should not be deemed to be a public figure for constitutional libel purposes was thoroughly considered by the district court and court of appeals and, in our view, was correctly rejected by both courts. The decision below is fully in accord with this Court's prior decisions.

In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 345, the Court noted that an individual may become a public figure in either of two alternative ways:

> "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a public controversy and thereby becomes a public figure for a limited range of issues." *Id.*, at 351.

In the instant case, petitioner's own voluntary actions placed him squarely within the second category of public figures described in *Gertz*—"a public figure for a limited range of issues."

Petitioner was a primary actor in the public controversy relating to the FBI investigation of a Soviet espionage ring and the activities of the special federal grand jury convened in the Southern District of New York to inquire into that matter. Through his criminal refusal to obey a duly authorized subpoena, which required his appearance before the special federal grand jury, petitioner voluntarily thrust himself into the public controversy relating to the government's espionage investigation. Because of the obvious prominence in the public's mind of the subject of espionage, and because petitioner's uncle, Jack Soble, had previously pleaded guilty to espionage charges, petitioner's determination not to appear before the grand jury legitimately aroused considerable public attention. His own willful conduct thereby exposed petitioner to increased public

scrutiny for the range of issues relating to espionage and the activities of the grand jury. As the court of appeals concluded:

> "By failing to appear before the grand jury Wolston invited public attention and comment. Until that failure occurred he enjoyed obscurity in the wings, but by subjecting himself to a citation for contempt he voluntarily stepped center front into the spotlight focused on the investigation of Soviet espionage. In short, by his voluntary action he invited attention and comment in connection with the public questions involved in the investigation of espionage. The reference to him in *KGB* related strictly to those issues, without intruding into his personal life or affairs. *Cf. Time, Inc.* v. *Johnston,* 448 F.2d 378, 381 (4th Cir. 1971). Any contention that his appearance on the stage was involuntary is conclusively answered by his conviction for contempt." (Pet. App. A-7, A-8).

We submit that petitioner was therefore properly held to be a public figure for the limited purposes of the issues in this case.

2. Petitioner's argument that his actions were analogous to Mrs. Firestone's involvement in divorce litigation in *Time, Inc.* v. *Firestone, supra,* ignores the present record. In concluding that Mrs. Firestone was not a public figure, this Court reasoned that Mrs. Firestone had not voluntarily injected herself into a public controversy merely by instituting a divorce litigation because "[s]he was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony." 424 U.S. at 454. The Court further explained that a divorce proceeding is "not the sort of 'public controversy' referred to in *Gertz,*" even though this particular divorce may have been a "cause celebre" in Palm Beach society. *Ibid.*

By contrast, petitioner's actions did not consist solely of invoking the legal process in a wholly lawful and customary manner. Unlike Mrs. Firestone, petitioner voluntarily chose to

violate the requirements of the legal process by refusing to respond to grand jury subpoenae and was accordingly adjudicated to have committed criminal contempt. Compliance with the subpoena, like Mrs. Firestone's compliance with the requirements of the divorce and maintenance laws, may have enabled petitioner to preserve his anonymity and to continue to maintain the full measure of protection to his privacy and reputation. Petitioner, however, elected not to comply with the subpoena and instead committed a criminal violation. Unlike Mrs. Firestone, petitioner was not compelled by the government to embark on a course that inevitably invited attention and comment. He freely chose to do so himself and consequently relinquished his status as a fully private individual.

Additionally, there can be no doubt that, unlike *Firestone,* the present case involves a "public controversy" as referred to in *Gertz.* The activities of Soviet espionage agents in the United States go directly to the security of the Nation itself, the debate concerning which must be "uninhibited, robust, and wide-open." *New York Times Inc.* v. *Sullivan,* 376 U.S. at 270. This matter cannot be compared to the divorce litigation involved in *Firestone,* a domestic and customarily private matter.

3. Contrary to petitioner's assertion (Pet. 11), it is also obvious that the court of appeals' decision is not based on the theory that involvement in a criminal proceeding renders a person a public figure. Nor did the court of appeals adopt any *per se* rule that commission of criminal conduct deprives an individual of his status as a private person. Rather, in concluding that petitioner was a public figure, the court of appeals relied upon the entire factual context surrounding petitioner's criminal conduct and the public controversy in which petitioner involved himself.

Petitioner explicitly recognizes that criminal conduct may make a person a public figure, but argues that his own

subjective intent was "to crawl into a hole" (Pet. 11). The question of petitioner's subjective intent is not only a legal irrelevancy, but a factual issue not worthy of this Court's consideration. In any event, as the court of appeals recognized (Pet. App. A-5, A-8), the willfulness of petitioner's conduct is conclusively answered by his conviction for contempt. This is plainly not the forum for relitigation of petitioner's criminal conviction.[2]

Finally, petitioner's argument that the standards regarding "public figures" are confusing and need further clarification is unsupported. He is unable to cite any cases demonstrating conflicting applications of *Gertz* and *Firestone* or any necessity for reexamination of the established principles. Moreover, the unique nature of the present factual setting, and the manifest correctness (in our view) of the decision below, make this case an inappropriate vehicle for any further articulation of the principles of *Gertz* and *Firestone*.

B. There Is No Conflict Among The Circuits Regarding The Summary Judgment Standard For Actual Malice and No Showing That Summary Judgment was Improperly Granted in This Case

1. With respect to the second question raised in his application (Pet. 14-19), petitioner asserts that there is a conflict between the District of Columbia Circuit and the Ninth Circuit regarding the principles governing summary judgment

[2] We note that much of petitioner's memorandum is devoted to constructing a self-serving factual rendition of the circumstances resulting in his contempt conviction. Petitioner's efforts to impeach his own guilty plea demonstrate the factual nature of the issues he seeks to raise as well as the inappropriateness of this case for review. Furthermore, petitioner's assertion that his own subjective intent determines whether he is a public figure runs contrary to this Court's decision in *Gertz* that public figures are individuals whose actions "invite attention and comment" and that "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." 418 U.S. at 345.

on the issue of "actual malice" as defined in *New York Times, Inc.* v. *Sullivan, supra.* In essence, it is contended that a concurring opinion to the District of Columbia Circuit's decision in *Wasserman* v. *Time, Inc.*, 424 F.2d 920, *cert. denied*, 398 U.S. 940 (1970), articulated a summary judgment standard different from that applied by the Ninth Circuit in *Guam Federation of Teachers, Local 1581, AFT* v. *Ysreal*, 492 F.2d 438, *cert. denied*, 419 U.S. 872 (1974).

To begin with, there is plainly no conflict between the District of Columbia Circuit and the Ninth Circuit regarding the applicable summary judgment standards. Although not revealed in petitioner's memorandum, the opinion in *Wasserman* upon which petitioner relies in his argument, and which the Ninth Circuit discusses in *Ysreal*, is a concurring opinion, and the views expressed by its author were purely *obiter dicta*. The Ninth Circuit explicity recognized this fact in *Ysreal*, noting that "[w]hat [the concurring judge] said was not necessary to the decision, because in *Wasserman* the court reversed a summary judgment for the defendant and remanded 'for trial on the issues of actual malice, defamation and possible damages.'" 492 F.2d at 440. The Ninth Circuit further observed (*id.*, at 443) that its own views were in fact consistent with the summary judgment standard actually followed by the District of Columbia Circuit, citing *Washington Post Co. Keogh*, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

Furthermore, the court of appeals in the instant case did not cite or purport to rely upon the views expressed by the concurring opinion in *Wasserman*. As its opinion reflects, the court of appeals applied traditional summary judgment principles, and viewing all the evidence in the light most favorable to petitioner, still concluded that there was no genuine issue regarding the question whether the allegedly defamatory statements were published with "actual malice."

Petitioner makes no showing that summary judgment was improperly granted or that there is a genuine issue in this case

regarding "actual malice." The court of appeals considered all of petitioner's contentions and found no evidence in the record that respondent Barron or the other respondents "in fact entertained serious doubts as to the truth of his publication" or recklessly disregarded whether it was true or false. *St. Amant* v. *Thompson,* 390 U.S. 727, 731 (1968). The court of appeals' opinion thoroughly examines the evidence in this regard, and we rely upon that discussion.[3]

Again, the issues which petitioner seeks to raise turn on the particular facts of this case and do not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[3] Petitioner's passing and unexplained suggestion that this case is a "variant" of the problem presented in *Herbert* v. *Lando,* No. 77-1105, *cert. granted,* March 20, 1978, is difficult to comprehend. The questions in *Herbert,* relating to the scope of discovery, bear no relation to the questions raised by petitioner. Here, petitioner was accorded full discovery rights and still presented no evidence of "actual malice."